

DEC - 9 1993

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Amendment of Sections 90.631(b) )  
of the Commission's Rules and )  
Regulations Concerning Loading )  
Requirements For 800 MHz Systems )

RM-8387

To: The Commission

COMMENTS  
OF THE  
NATIONAL ASSOCIATION OF BUSINESS  
AND EDUCATIONAL RADIO, INC.

The National Association of Business and Educational Radio, Inc. ("NABER") by its attorneys, respectfully submits, pursuant to Section 1.401 of the Commission's Rules, 47 C.F.R. §1.401, its Comments in response to the Petition for Rule Making filed by the American Mobile Telecommunications Association ("AMTA") which seeks to amend Section 90.631(b) of the Commission's Rules to provide that licensees of 800 MHz private land mobile radio systems granted prior to June 1, 1993 will not be required to load their systems to seventy percent (70%) of authorized capacity.<sup>1</sup>

I. BACKGROUND

NABER is a national, non-profit, trade association headquartered in Alexandria, Virginia, that represents the interests of large and small businesses that use land mobile radio communications as an important adjunct to the operation of their businesses and that hold thousands of licenses in the private land

<sup>1</sup>FCC Report No. 1986, released November 16, 1993.

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mobile radio services. **NABER** has six membership sections representing Users, Private Carrier Paging licensees, radio system integrators, Technicians, Specialized Mobile Radio operators and Tower Site Owners and Managers. **NABER's** membership comprises over 6,000 of these businesses and service providers holding thousands of licenses in the private land mobile services.

For the past 19 years, **NABER** has been the recognized frequency coordinator in the 450-470 MHz and 470-512 MHz bands for the Business Radio Service. **NABER** is also the Commission's recognized frequency coordinator for the 800 MHz and 900 MHz Business Pools, 800 MHz General Category frequencies for Business eligibles and conventional SMR Systems, and for the 929 MHz paging frequencies. In its Report and Order in PR Docket No. 83-737, the Commission designated **NABER** as the frequency coordinator for all Business Radio Service frequencies below 450 MHz and, in a joint effort with the International Municipal Signal Association ("IMSA") and the International Association of Fire Chiefs ("IAFC"), the Special Emergency Radio Service frequencies.

Presently, Section 90.631(b) of the Commission's Rules provides that licensees of systems in the SMR Pool are required to load their systems to seventy percent (70%) of authorized capacity within five (5) years of the initial license term.<sup>2</sup> However, channels are only taken back from systems failing to meet this loading requirement at

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<sup>2</sup>Licenses of systems in the SMR Pool include SMR Systems, non-SMR Systems licensed prior to the merger of "old" Subpart M trunked frequencies into the SMR Pool, and non-SMR Systems licensed pursuant to the Commission inter-pool sharing rules.

the five (5) year anniversary date of the initial authorization date for the frequencies where all SMR Pool channels in the area have been assigned to systems, resulting in the establishment of a "Waiting List" for SMR Pool channels in the area. Further, channels are only taken back where at least (1) of the applicants on the Waiting List is able to utilize the frequencies at its requested location.

Pursuant to the Commission's action in PR Docket No. 86-404, Section 90.631(b) also provides that the loading requirement only pertains to systems licensed prior to June 1, 1993.<sup>3</sup> Systems licensed after that date will not be required to meet a loading test at the five (5) year anniversary. Rather, licensees will only be required to construct their systems and place two (2) mobile or control units on the system.<sup>4</sup>

AMTA's Petition seeks to eliminate the requirement to load trunked SMR Systems licensed prior to June 1, 1993. It is AMTA's position that the rule no longer serves a usual purpose, and is inhibiting the growth of the SMR industry.

## II. COMMENTS

NABER applauds AMTA's joining of the now unanimous chorus which seeks to remove the significant burden of licensees with initial

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<sup>3</sup>Report and Order, PR Docket No. 86-404, 3 FCC Rcd. 1838 (1988).

<sup>4</sup>The two (2) unit requirement is necessary to meet the Commission's "in operation" test. Report and Order, PR Docket No. 90-481 (Finders Preference).

license grants prior to June 1, 1993. Over one year ago, NABER foresaw the injustice which was to be visited upon such SMR licensees in secondary markets, and NABER twice requested that the Commission provide legitimate licensees relief.<sup>5</sup> However, NABER's prediction that legitimate licensees in secondary markets would need to meet loading tests where insufficient mobile loading is presently available has proved accurate. Thus, for the reasons detailed below, NABER supports AMTA's Petition for Rule Making and requests that the Commission expeditiously issue a Notice of Proposed Rule Making to amend its Rules.<sup>6</sup>

Although AMTA's Petition is based upon the premise that the rule no longer serves a purpose and is inhibiting the growth of the SMR industry, there is also a much greater rationale for the rule change. Specifically, the development of Waiting List areas for virtually the entire country has resulted in legitimate licensees in truly secondary and rural markets with initial license grants prior to June 1, 1993 being faced with the need to load their systems. However, many such areas do not have sufficient analog, dispatch mobile loading available to permit retention of channels by licensees.

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<sup>5</sup>The Petition for Rule Making was filed by NABER on March 6, 1992. The Petition was dismissed by the Commission on July 6, 1992. NABER filed a Petition for Reconsideration of the Commission's action on August 4, 1992, and the Commission rejected the Petition for Reconsideration on February 22, 1993 (FCC 93-108).

<sup>6</sup>NABER also supports AMTA's request to stay any pending "take-back" proceedings, and NABER urges the Commission to immediately act upon the request.

Three (3) factors have combined to create Waiting List areas in virtually the entire country. First, the elimination of the five (5) year loading rule has caused many operators to expand their operations into areas where sufficient loading to satisfy Section 90.631(b) is not generally available. Second, the desire of larger SMR entities to "build-out" ubiquitous, regional digital SMR Systems has placed spectrum demands in areas of the country where spectrum has typically been readily available. Third, infomercials on cable television systems touting SMR as the "third cellular system" has led to a significant increase in SMR applications in areas of the country which have previously been considered "rural" in terms of SMR spectrum utilization.

These three factors have combined to create Waiting List areas in seventy-five (75) areas around the country. As shown on the attached map, almost the entire Eastern Coast of the United States is now in a Waiting List area, and there are contiguous Waiting List areas from Florida through New Mexico. Numerous additional Waiting List areas can be expected to be added to this list shortly as the result of: (1) EMSR applications which are still pending at the Commission covering many parts of the country; (2) numerous requests for extended implementation, pursuant to Section 90.629 of the Commission's Rules, for new wide-area systems to be implemented by applicants which are not currently SMR providers;<sup>7</sup> (3) "blanket" filings where some applicants have applied for numerous

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<sup>7</sup>See, for example, the extended implementation request of Digital Radio L.P., FCC File No. 626586, et. al.

authorizations more than forty (40) miles apart, but within seventy (70) miles of each other;<sup>8</sup> and (4) cable television "infomercial" related filings which have not yet been processed.

The confluence of these factors has caused a significant amount of spectrum in what was once "secondary" markets to be licensed, many with five year construction periods, without such spectrum being placed in operation. As a result, in such secondary markets, there are licensees which for five (5) years have legitimately attempted to load their systems. However, due to the economic conditions in the market and the size of the market, sufficient loading cannot be achieved within the necessary time frame. Legitimate licensees are therefore losing channels to applicants on the Waiting List which may not have the intent to construct and operate systems in the area, while significant spectrum in the same market is not constructed due to extended implementation grants.

At NABER's Fall Conference, held in October, the problems with the rapid development of Waiting List Areas was discussed in detail. It was the consensus of the attendees that the Commission's loading rules have served the land mobile industry well. In major urban areas, the rules have ensured that spectrum did not lay fallow and

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<sup>8</sup>See, for example, the applications filed on September 23-24, 1993, by Carolyn Rand, Car Care Services, Inc., Bo Ture Ahlberg, Barbara Strutsky, Arnold M. Goldstein, Doris Bestland, Conrad Clark, Constance Corbino, Elizabeth Vodra, Gary Andres, Heather Johnson, Jeffrey Leites, Jody Robbins, Kim Morton, Kurt Lucas, Lesles Branson, Madeline Brechlin, Mark Johnson, Matthew Meacham, Robert Alexander, Michael Schwalb, Scott Lebharr, Tim Cherry, Tony Anderson and William Keith, for new five (5) channel systems in Little Rock, Fayetteville and Fort Smith, Arkansas. FCC File Nos. 634060-634900.

was not hoarded. However, there are virtually no SMR Systems in major urban areas<sup>9</sup> which have not already passed the five (5) year loading benchmark, or which have already been loaded prior to the applicable date. As a result, there are few, if any, channel takebacks in areas of the country where there is a real capacity shortage. In smaller areas, the loading rules now serve only to penalize operators which have genuinely attempted to load their systems, while significant 800 MHz spectrum is unconstructed in the same area. Thus, it is **NABER's** view that the Commission's loading rules for trunked SMR Systems has passed its period of usefulness to accomplish the Commission's purpose.

**NABER** believes that legitimate licensees in secondary markets should not be penalized during the "transition period" created by the change in the Commission's rules and other factors cited above. To avoid this result, **NABER** supports AMTA's request that the Commission delete Section 90.631(b) and eliminate the five (5) year loading requirement. Further, **NABER** supports AMTA's request and respectfully requests that the Commission stay enforcement of

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<sup>9</sup>Urban areas are defined in Section 90.621(d) of the Commission's Rules as locations less than 100 miles from New York, New York; Los Angeles, California; Chicago, Illinois; Philadelphia, Pennsylvania; San Francisco, California; Detroit, Michigan; Boston, Massachusetts; Houston, Texas; Washington, D.C.; Dallas-Fort Worth, Texas; Miami, Florida; Cleveland, Ohio; Saint Louis, Missouri; Atlanta, Georgia; Pittsburgh, Pennsylvania; Baltimore, Maryland; Minneapolis-Saint Paul, Minnesota; Seattle, Washington; San Diego, California; and Tampa-Saint Petersburg, Florida. These are areas of the country where true spectrum shortages exist. This definition of "urban areas" is different than the definition of "Wait List Areas", which are areas where at least one application for SMR Spectrum has been filed for which "clear" channels are not available at the specific location requested.

90.631(b) during the pendency of this proceeding, in order to prevent additional unnecessary hardship on legitimate licensees.

### **III. CONCLUSION**

**WHEREFORE**, the National Association of Business and Educational Radio, Inc. respectfully requests that the Commission adopt a Notice of Proposed Rule Making seeking to delete Section 90.631(b) of its rules consistent with this Petition.

Respectfully submitted,

**NATIONAL ASSOCIATION OF BUSINESS  
AND EDUCATIONAL RADIO, INC.**

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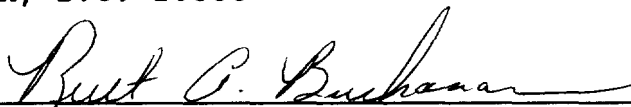
Date: December 9, 1993



**CERTIFICATE OF SERVICE**

I, Ruth A. Buchanan, a secretary in the law firm of Meyer, Faller, Weisman and Rosenberg, P.C., hereby certify that I have on this 9th day of December 1993, sent via First Class United States Mail, postage prepaid, a copy of the foregoing **Comments** to the following:

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